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No. 96-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAOLO GUCCI DESIGN STUDIO, LTD.,

Petitioner,

vs.

FRANK G. SINATRA, as Trustee of the Substantively Consolidated Estates of Paolo Gucci, et al., GUCCIO GUCCI, S.P.A. and GUCCI AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioner can challenge the bankruptcy court's jurisdiction over a controversy when it voluntarily submitted that controversy to the bankruptcy court for its determination without contending that the matter was "non-core" or seeking withdrawal of the reference.

2. Whether Petitioner can challenge the constitutionality of Section 363(m) of Title 11, United States Code 11 U.S.C. §101 *et seq.* (the "Code") before the Supreme Court when the contention was not raised before the court of appeals, the district court or the bankruptcy court.

3. Whether the court of appeals erred in not imposing a trust upon the proceeds of the asset sale when Petitioner never requested that the court of appeals, the district court or the bankruptcy court impose such a trust.

4. Whether Petitioner lacks standing to complain about the sale of certain assets by the bankruptcy estate when it has no interest in any of the assets sold by the bankruptcy estate.

5. Whether the court of appeals erred in finding the controversy to be moot under Section 363(m) of the Code where (i) the transaction closed prior to Petitioner obtaining a stay from the court of appeals, and (ii) it would have been impossible to restore the parties to the *status quo ante*.

6. Whether events following the decision of the court of appeals have "further mooted" this controversy precluding review by the Supreme Court.

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STATEMENT

Respondent-Frank G. Sinatra (the "Trustee"), as Chapter 11 Trustee of the substantively consolidated estate (the "Estate") of *Paolo Gucci, et al.*, submits this brief in opposition to the petition for a writ of certiorari (the "Petition") of Paolo Gucci Design Studio, Ltd. ("PGDS"), which seeks review of the Orders of the United States Court of Appeals for the Second Circuit, dated December 4, December 13 and December 24, 1996 (collectively the "Orders"). Petitioner's Appendix ("Pet. App.") la-17a.

Procedural Background

The Orders affirm an Order of the United States District Court for the Southern District of New York (Griesa, C.J.) which in turn, affirms an Order of the United States Bankruptcy Court for the Southern District of New York (Gallet, J.) dated October 15, 1996 (the "Sale Order") (Pet. App. 25a-37a).

In pertinent part, the Sale Order:

> (a) permits the Trustee, pursuant to §363(b), (f) and (m) of the Code to sell to Guccio Gucci, S.p.A. and Gucci America, Inc. (collectively "GG") certain property of the Estate (the "Assets") consisting generally of all Paolo Gucci trademarks, right to commercially exploit the Paolo Gucci name, and all related property and rights. Included among the Assets are postpetition product designs of Paolo Gucci ("Paolo") using the Paolo Gucci name (the "Postpetition Designs");
>
> (b) finds the Assets are property of the Estate under Code §541; and
>
> (c) finds that PGDS does not own, or have the right to use or license any of the Assets.

Upon entry of the Sale Order, the bankruptcy court denied the stay application of PGDS, but stayed the sale for 48 hours to afford PGDS the opportunity to seek a stay from the district court. The district court, concerned that the failure to grant the stay would moot the appeal, granted PGDS' stay application and expedited the appeal. After a comprehensive two-day hearing, the district court affirmed the Sale Order and denied any further stay, finding no likelihood of success on appeal, and that the Estate had no alternative but to proceed with the sale. Transcript ("Tr.") 11/21/96, p. 125

Following the affirmance by the district court, the Trustee and GG consummated the sale. The Assets were irrevocably conveyed and the portion of the purchase price due at closing

was fully and irrevocably paid prior to 5:45 p.m. on November 22, 1996 -- the approximate time at which the court of appeals issued an interim *ex parte* stay (which was dissolved shortly thereafter).

Factual Background

Paolo was a member of the Gucci family which is well-known for its connection with the Gucci trademark and products. Paolo worked for GG for some years as a designer. Thereafter, he established his own licensing business by entering into licensing agreements with various entities.

Under these agreements, the licensees or sublicensees were permitted to use the marks and designs of Paolo Gucci. The licenses generally provided that the designs and ornamental appearance for the "Licensed Products" were the "sole property of Licensor." Under the agreements, Paolo would be retained as the respective licensee's designer, would make public appearances and provide design and consultation services. Affidavit of Scott H. Wyner, sworn to August 14, 1996, pp. 2-7.

GG opposed Paolo's use of the Gucci name by commencing trademark infringement litigation throughout the world, obtaining favorable results eliminating or limiting Paolo's ability to use the Gucci name in numerous countries.

In litigation commenced by Paolo in the United States entitled *Paolo Gucci v. Gucci Shops, Inc.*, the district court ruled that Paolo could describe and merchandise products designed or selected by him as products "designed by Paolo Gucci", subject to certain restrictions. *See*, Final Judgment dated July 13, 1988, as clarified by Order dated January 12, 1994 (collectively, the "Final Judgment"). (Pet. App. 52a-55a and Respondent's Appendix ("Res. App.") A-1–A-3.) The 1994 clarifying order makes clear that Paolo could license to other entities the right to commercially exploit the use of his name

under the conditions set forth in the Final Judgment, and that such entities could sublicense the rights.[1]

On February 8, 1994, Paolo filed a voluntary petition for relief under Chapter 11 of the Code with the bankruptcy court. Following a motion by the United States Trustee, the bankruptcy court approved the appointment of the Trustee to serve as a Chapter 11 trustee for Paolo and certain other debtors related to Paolo.

Paolo sought to reorganize his licensing business through his Chapter 11 case. The Local Bankruptcy Rule 52 Affidavit, which accompanied his petition, states as follows:

> [Paolo] is an individual whose principal business consists of the licensing of trademarks for use in various commercial ventures and design work in conjunction therewith.

On his Schedules of Assets and Liabilities filed pursuant to Fed. R. Bankr. P. 1007(b), in response to Question 21 of Schedule B, Paolo lists as an asset his interest in certain trademarks in the United States and Korea which he valued at $5,000,000.

PGDS claimed interest in the Postpetition Designs arises solely from its involvement in a proposed settlement between the Estate and Paolo which was never approved by the bankruptcy court. The settlement agreement is dated October 3, 1995, and consisted of a main agreement, initially executed in July 1995 among the Trustee, Paolo and others, and an

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[1] The Petition mischaracterizes the Final Judgment by (i) ignoring the 1994 clarifying order (including omitting it from the Appendix), (ii) ignoring the January 23, 1996 conference held before District Judge Conner discussed below and (iii) stating, at p. 5, that the Final Judgment prohibited the "use in an independent business operation, the name 'Paolo Gucci'...". If PGDS' interpretation of the Final Judgment were correct, it could have not obtained any of the rights it claims to have obtained from Paolo.

October 3, 1995 amendment (collectively, the "Agreement") among the same parties save for the addition of PGDS.[2]

The Agreement provided that Paolo, after the July 1995 execution of the main agreement, but prior to October 15, 1996, would identify a master licensee (referred to as "Newco") to which he would "license all of his rights under the ... Final Judgment." Agreement §I.A.4, p. 7. The Agreement also required that the contemplated master license "comply with, and agree to be bound by, this Agreement in all respects ... and not contradict this Agreement or any term or provision thereof." Agreement §I.A.4.(a), p. 8. It further provided that it is "not ... effective unless and until ... signing of the [bankruptcy court] Order [approving it]", Agreement §4.H., p. 46. The commencement of licensing activities through "Newco" is permitted only upon "signing of the Order...". Agreement §I.B.1.(d), p. 11. Finally, only upon signing of the contemplated bankruptcy court approval order would the Estate convey to Paolo (subject to certain restrictions) "all of the Estate's rights under the Final Judgment ...". Agreement §II.B., p.39.

Paolo thereafter selected PGDS as his master licensee, and on or about October 3, 1995 the amendment was executed. It identified PGDS as "Newco" and was executed by PGDS -- thereby rendering PGDS a party to the Agreement. Simultaneously, with the execution of the amendment, and as contemplated by the Agreement, Paolo entered into a master license with PGDS (the "PGDS License"). The PGDS License purported to license to PGDS the right to merchandise products bearing the Paolo Gucci name in accordance with the Final Judgment.[3] The PGDS License provided, among

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[2] Upon execution of the amendment, the July 1995 main agreement and the amendment were both deemed executed as of October 3, 1995. In December 1995, the Trustee made a motion to the bankruptcy court to approve the Agreement but, as a result of the auction, discussed below, the motion was never granted.

[3] The Petition, at p. 6, incorrectly states that the PGDS License is a license of the Postpetition Designs.

other things, that "The artistic and creative designs ... shall be the sole property of Paolo Gucci ..." PGDS License, ¶3.4. As mentioned above, PGDS also executed the amendment, thereby binding itself to all terms of the Agreement:

> All obligations imposed upon 'Newco' under the Agreement shall apply to [PGDS], and [PGDS] assumes, and agrees to be bound by, all such obligations in all respects.

Amendment to Agreement, §7, p.4.

PGDS thereafter entered into a series of sublicenses. However, since under the Agreement PGDS had not yet obtained any licensing rights and was not permitted to begin licensing activities, each such sublicense was contingent upon and subject to bankruptcy court approval of the Agreement. *See, e.g.* Addendum to Agreement between PGDS and A.V. by Versace, Inc., dated February 1, 1996.

The Agreement (¶ II. C, pp. 39-40) also required that, in connection with the contemplated bankruptcy court approval thereof, the Trustee would obtain the "full settlement of all ... claims of Jennifer Gucci against [Paolo], including stipulations or order(s) against [Paolo] ...". This was necessary to implementation of the Agreement since one such order is the December 29, 1993 Order entered by the Supreme Court, State of New York, County of New York (Gangel-Jacob, J.) in the *Jennifer Gucci v. Paolo Gucci* matrimonial action. Under this Order, at p. 15, Paolo was enjoined and restrained from "transferring, selling ... or otherwise disposing of any and all ... property or other assets ...". That Order has been in full force and effect at all relevant times.

On October 12, 1995, Paolo died. On December 5, 1995, his widow, Jennifer Gucci, was appointed as personal representative of Paolo's decedent estate by Order of the High Court of Justice, Principal Registry of Family Division, London, England.

After Paolo's death, a pre-motion conference was requested by GG to obtain a ruling from District Judge Conner that, due

to the death of Paolo, the U.S. licensing rights under the Final Judgment to use the Paolo designation were eliminated. At the conference, held on January 23, 1996, Judge Connor stated, however, that Paolo's designs could continue to be exploited notwithstanding the death of Paolo, as long as they complied with the Final Judgment.

By motion dated March 27, 1996 (the "Committee Motion"), the Official Committee of Unsecured Creditors (the "Committee") made a motion to approve an offer of GG (the "GG Offer") to purchase the Assets for $3,000,000 on the terms and conditions set forth in the GG Offer. Those conditions included a finding that the Assets, including the Postpetition Designs, were property of the Estate under Code §541.

By motions dated May 3, 1996 and September 3, 1996, PGDS sought entry of an order of the bankruptcy court that the Postpetition Designs are not property of the Estate (the "PGDS Motion"). The PGDS Motion does not allege that the issue of ownership of the Postpetition Designs is "non-core", nor did PGDS seek withdrawal of the automatic reference to the bankruptcy court or to limit the role of the bankruptcy court to making findings of fact and conclusions of law for review by the district court. By decision dated October 9, 1996 (the "Designs Decision"), the bankruptcy court denied the PGDS Motion.[4] In denying the PGDS Motion, the bankruptcy court found that the Estate owned, and could sell the Postpetition Designs, finding:

> Paolo's ability to create designs bearing his name and trademark is so inexorably tied to the licensing business that it is impossible to separate the two. They are in fact one in the same, and each cannot exist without the other.

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[4] The Designs Decision, at footnote 1, Pet. App. 39a, finds that the matter "is a core matter 28 U.S.C. §157(b)(2)(A)". This finding was not appealed by PGDS.

> I agree with the Trustee's characterization that if this were a situation where Paolo designed for another company, and those designs were to be used in conjunction with a trademark, other than "Paolo Gucci," then Paolo probably would have been entitled to retain those post-petition designs, and the revenue flowing therefrom. However, those are not the facts before me. Paolo, and his purported successor in interest, PGDS, cannot be allowed to continue the business of licensing Paolo's name and trademark. That business, which the Trustee is selling, is the exact business for which Paolo originally sought bankruptcy protection. (Pet. App. 51a)

The bankruptcy court scheduled an auction to consider the GG Offer, the offer embodied in the Agreement and any other offers for the Assets. PGDS, together with a group of entities, bid at the auction. (Tr. 8/2/96, pp. 41-43).

GG improved the GG Offer at the auction held on August 2, 1997, by offering to buy the Assets for an aggregate amount of $3,650,000, of which $2,650,000 would be (and now has been) paid at the closing of the GG Offer (the "Closing Funds") and the remaining $1,000,000 to be paid if and when post-closing conditions were satisfied. PGDS, made a bid but repudiated it immediately after the close of bidding, and failed to post the downpayment required by the bankruptcy court. (Tr. 8/9/96, pp. 6-9).

The Trustee recommended the GG Offer as the highest and best bid, which was accepted by the bankruptcy court. To proceed with the closing of the GG Offer, the Trustee formally moved under Sections 363(b), (f) and (m) of the Code for entry of the Sale Order (the "Trustee Motion").

Upon entry of the Sale Order, PGDS, among others, immediately moved for a stay pending appeal. The bankruptcy court denied the motion:

> I don't believe that ultimately PGDS ... [has] standing to appeal in this matter. I think that's a

> very important issue. I think that [it comes] here primarily, if not entirely, as [an] unsuccessful [bidder] ...
>
> * * *
>
> [I]f PGDS is doing $80 million in business, this estate is going to do much better than anybody thought because they are going to be paying a lot of money for it, for all the business that they've already done *because it is clear to me from these documents that they don't have a right to do any of it, any of it whatsoever, nor does PGDS have a right in this case to appeal. You don't get standing to appeal by converting something that the Debtor owns.* That doesn't give you standing to appeal so they are -- it works in the other direction. They move against you. (emphasis added)

Tr. 10/15/96, pp 180-181.

Among the Assets are the Paolo Gucci trademarks in Korea (the "Korean Marks"). At the auction, Crown Corporation ("Crown"), a Korean company bid $1,700,000 to purchase the Korean Marks. To support its bid, Crown posted the sum of $900,000, $170,000 of which was delivered to the Trustee as a downpayment and $730,000 of which was delivered to its counsel in New York. Those funds have since been returned to Crown in Korea.

At the time of the auction, an appeal was pending before the Seoul High Court in Korea seeking to reverse an injunction granted in the court below in favor of GG which prohibits the use by a large Korean sublicensee of the Korean Marks. The president of Crown testified before the bankruptcy court that the effect of an affirmance by the Seoul High Court would be "devastating" to the value of the Korean Marks. Tr. 7/12/96, pp. 106-107. Since the auction, the Seoul High Court has affirmed the lower court decision, effectively destroying, or greatly diminishing, the value of the Korean Marks.

Since the auction through January 31, 1997, the Estate has disbursed the sum of $730,290. Since the Closing Funds constitute most of the cash of the Estate which is not subject to any escrow requirement prohibiting disbursement thereof, most of this money disbursed since the auction consisted of the Closing Funds.

ARGUMENT

I. Having Submitted The Matter To The Core Jurisdiction Of The Bankruptcy Court, PGDS Cannot Now Raise A Marathon-Type Objection

In order to cure the jurisdictional issues identified by this Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 103 S.Ct. 2858, 73 L.Ed.2d (1982) *("Marathon")*, Congress, in 1986, amended U.S.C. Title 28. Under these amendments, 28 U.S.C. §1334(a) and (b) confers jurisdiction in the federal courts over bankruptcy cases, and over proceedings arising under the Code or arising in or related to bankruptcy cases. 28 U.S.C. §1334(e) confers exclusive jurisdiction upon the district court where the bankruptcy case is commenced over "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the Estate." 28 U.S.C. §157(a) permits the district court to refer all bankruptcy cases, and proceedings arising under, arising in or related to bankruptcy cases, to the bankruptcy court. (The District Court for the Southern District of New York has done so.) 28 U.S.C. §157(b) permits the bankruptcy judges to hear and determine all "core" proceedings arising under the Code or arising in bankruptcy cases. Furthermore, under subsection (c), the bankruptcy judge "may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11". In such a proceeding the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court for final determination.

Section 157(b)(3) requires the bankruptcy court to decide on its own motion "or on a timely motion of a party" whether or not a proceeding is core. Finally, under 28 U.S.C. §157(d),

the district court, on its own motion "or on timely motion of any party" may withdraw the automatic reference to the bankruptcy court of all or any part of a bankruptcy case or proceeding.[5]

In *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed. 2d 675 (1986), certain individuals filed reparations complaints with the CFTC. In response, the broker-defendant filed a counterclaim to recover debit balances. After losing before the CFTC, the appellant-customers argued, among other things, that the CFTC's assumption of jurisdiction over the counterclaims violated their rights under Article III of the Constitution. This argument was based, in part, upon this Court's decision in *Marathon*. In *CFTC v. Schor*, this Court, following a discussion of the judicial power embodied in Article III, stated as follows:

> Our precedents also demonstrate, however, that Article III does not confer on litigants an absolute right to plenary consideration of every nature of claim by an Article III court. (citations omitted) Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. (citations omitted). Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication. (citations omitted)
>
> In the instant cases, Schor indisputedly waived any right he may have possessed to the full trial of

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[5] The full text of 28 U.S.C. §157 and 28 U.S.C. §1334 are set forth herein at Appendix B, pp. B-1–B-5.

> Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, see App. 13, 19, and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration of Conti's counterclaim.
>
> Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver.

478 U.S. at 848-49, 106 S.Ct. at 3255-3256. *See, also, Matter of Texas General Petroleum Corp.*, 52 F.3d 1330, 1337 (5th Cir. 1995).

In *General Petroleum*, the Fifth Circuit held as follows:

> A party may waive its constitutional right to an Article III court. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848-50, 106 S.Ct. 3245, 3255-56, 92 L.Ed. 2d 675 (1986) ; *Pacemaker Diagnostic Clinic of America v. Instromedix. Inc.*, 725 F.2d 537, 542-43 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984). We note that the bankruptcy court has statutory authority to enter judgment in non-core matters with the consent of the parties. 28 U.S.C. §157(c)(2); *cf.*, 28 U.S.C. §636(c) (allowing magistrates to enter judgment in bench or jury trials with the consent of the parties).
>
> A party who fails to object to a bankruptcy court's assumption of core jurisdiction consents to that court's entry of final judgment. *Abramowitz v. Palmer*, 999 F.2d 1274, 1279-80 (8th Cir. 1993); *In*

> *re G.S.F. Corp.*, 938 F.2d 1467-77 (1st Cir. 1991); *In re Mann*, 907 F.2d 923, 926 (9th Cir. 1990); *In re Men's Sportswear*, 834 F.2d 1134, 113738 (2d Cir. 1987); *DuVoisin v. Forster (In re Southern Indus. Banking Corp.)*, 809 F.2d 329, 331 (6th Cir. 1987). McFarland did not object to bankruptcy court jurisdiction before or during the hearing on the standing issue. By failing to object in the bankruptcy court, McFarland consented impliedly to the court's assumption of core jurisdiction.");

See, also, In re S.G. Phillips Constructors, Inc, 45 F.3d 702 (2d Cir. 1995); *Pipkin v. JVM Operating, L.C.*, 197 B.R. 47, 55 (E.D. Tex. 1996). *See also, Langenkamp v. Culp*, 498 U.S. 42, 112 S.Ct. 330, 111 L.Ed.2d. 343 (1990) *per curiam*; *Katchen v. Landy*, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.391, (1966).

The instant case falls squarely within the precedents cited above and, accordingly, there is no jurisdictional infirmity.

In the PGDS Motion, PGDS voluntarily submitted to the bankruptcy court the issue of its claimed interest in the Postpetition Designs for final determination by the bankruptcy court. Opposition papers were filed, the matter was fully litigated, and finally decided by the bankruptcy court. As noted above, the bankruptcy court's decision contains a specific finding that the matter is core -- a finding which has never been appealed by PGDS.

Furthermore, in its opposition papers to the Committee Motion and the Trustee Motion, PGDS never alleged that the issue of PGDS' alleged interest in the Postpetition Designs was noncore. Nor did PGDS ever request that the district court withdraw the automatic reference of this matter to the bankruptcy court under the applicable provisions of 28 U.S.C. §157(d).[6]

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[6] Only in a belated submission to the bankruptcy court in September 1996 did PGDS suggest that the bankruptcy court had no jurisdiction over the

(Footnote continued)

Accordingly, the court clearly had jurisdiction over the issue, and PGDS consented to the final adjudication of the claim. For example, in *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987) a panel of the Second Circuit commented:

> ... even if the instant action was not a "core" proceeding, 28 U.S.C. §157(c)(2) empowers the bankruptcy court to enter final judgment in a "non-core" but "related" matter, provided both parties consent .... Sasson's failure to object to ... "core jurisdiction" at any point in these extensive proceedings before the bankruptcy court ... constitutes consent to the final adjudication of this controversy before the bankruptcy court.

See also, DuVoisin v. Foster, 809 F.2d 329, 331 (8th Cir. 1987).

In light of the foregoing and pursuant to *CFTC v. Schor* and the other precedents cited above, PGDS has consented to the exercise of jurisdiction by the bankruptcy court over this controversy and has waived any contention that the matter was non-core. It selected the manner in which it wished the matter resolved, and was accorded all of the attendant procedural rights, including full review of all issues by the district court. Even if the matter were non-core, the bankruptcy court, pursuant to 28 U.S.C. §157(c)(1), could nevertheless hear the matter and make recommendations to the district court. PGDS, however, never even requested that the bankruptcy

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Postpetition Designs. Implicity acknowledging the lack of merit of this position, however, PGDS never withdrew its motion to have the issue determined by the bankruptcy court, moved to have the automatic reference withdrawn, sought a determination pursuant to 28 U.S.C. 157(b)(3) whether the matter was non-core, or even allege that the matter was non-core.

court limit its role to entering proposed findings and conclusions.[7]

II. PGDS Does Not Raise a True Constitutional Challenge to Code §363(m) And, In Any Event, Having Failed To Challenge The Constitutionality Of Code §363(m) Below, PGDS Is Precluded From Raising It For the First Time Before The Supreme Court

The Petition does not claim any inherent constitutional infirmity with respect to §363(m); it only alleges that it was entitled to submit the issue to an Article III court. This, as described above, however, was waived by PDGS. In any event, it received full review by the district court. Furthermore, no "constitutional" challenge to §363(m) was raised below and thus the issue may not be considered by the Supreme Court.

An appellate court may only consider the record as it was before the trial court. *See, e.g. In re Freeman*, 956 F.2d 252, 255 (11th Cir. 1992) (issues not raised in the bankruptcy court may not be raised on appeal); *Brock v. Logan County Sheriff's Dept. of Arkansas*, 3 F.3d 1215 (8th Cir. 1993) (issues raised in plaintiff's "brief in support of complaint" not appearing in complaint before trial court could not be considered for the first time on appeal); *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *rehearing denied*, 961 F.2d 215, *cert. denied*, 113

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[7] PGDS's entire Marathon argument fails in any event for the reason that the determination of what constitutes property of the estate "arises under" Code §541, and is thus within the core jurisdiction of the bankruptcy courts. *See, In re Becker*, 136 B.R. 113 (Bankr. D.N.J. 1992); 28 U.S.C. §1334(a), (b) and (e); 28 U.S.C. 157(b)(1)(4). *See, e.g., Taubel-Scott-Kitzmiller Company. Inc. v. Fox*, 264 U.S. 426, 430-31, 44 S. Ct. 396, 398, 68 L.Ed. 770, 773 (1924). ("Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is."); *In re Duval County Ranch Co.*, 167 B.R. 848 (Bankr. S.D. Tex. 1996) (whenever there is a dispute as to whether property is property of bankruptcy estate, exclusive jurisdiction is in bankruptcy court.)

S.Ct 82 (1992) (facts not presented at trial cannot be asserted on appeal from summary judgment); *Ballard Medical Products v. Wright*, 821 F.2d 642 (Fed. Cir. 1987). *See also Holly Farms Corp.* v. *N.L.R.B.*, __U.S. __, 116 S.Ct. 1396, 1402, n. 7, 134 L.Ed.2d 593 (1996); *Matsushita Electric Industrial Co. v. Epstein*, __U.S.__, 116 S.Ct. 873, 880 n. 7, 134 L.Ed.2d 6 (1996).

Throughout the extensive litigation before the bankruptcy court regarding PGDS' alleged interest in the Postpetition Designs, PGDS never challenged the constitutionality of Code §363(m). Furthermore, through two fully argued and litigated appeals, including at least three motions for stays pending appeal, PGDS never asserted or claimed that Code §363(m) was "unconstitutional".[8]

III. The Court Of Appeals Did Not Err In Not Imposing A Constructive Trust On The Proceeds Where PGDS Never Requested That A Constructive Trust Be Imposed

Code §363(m) prohibits the appellate court from affecting "the validity of a sale" under §363(b) or (c) of the Code as long as the assets were sold to a purchaser "in good faith" unless the appellant obtained a stay pending appeal. PGDS, in its appeals below, however, sought precisely that which §363(m) prohibits, *i.e.*, the reversal of the sale to GG under §363(b). Consistent with the statute, the court of appeals correctly found that it could not unwind the sale and accordingly limited the scope of the appeal to the issue of whether or not GG was a purchaser "in good faith."

In the Petition, PGDS cites *In re Osborne*, 24 F.3d 1199 (10th Cir. 1994) for the proposition that a constructive trust

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[8] This failure to raise any constitutional challenge prevented the bankruptcy court, the district court and the court of appeals from complying with the requirement of 28 U.S.C. §2403(a), regarding notification to the United States that a challenge to the constitutionality of a federal statute, in this instance, Code §363(m), had been made.

can be imposed upon the proceeds of the sale pursuant to Code §363(b).[9] This argument, however, is unavailing for the reason that PGDS never made any request to the court of appeals, to the district court or to the bankruptcy court that any type of trust be imposed upon the sale proceeds.[10] Having failed to raise this issue below, it cannot be now raised for the first time on appeal.[11]

IV. PGDS Has No Interest In The Postpetition Designs And Accordingly Lacks Standing

The issue of standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). *See also Arizonans for Official English* v. *Arizona*, __U.S.__S.Ct.__, 1997 WL 84990, p. 33 (1997). Code §1109(b) provides that a party in interest may appear and be heard on any issue in the case. This provision, however, does not confer standing in the absence of a legally

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[9] PGDS also cites *In Re Swedeland Development Group, Inc.*, 16 F.3d 552 (3d Cir. 1994), which is an analogous decision involving the mootness rule prohibiting reversal of postpetition loans in the manner set forth in §364(e) of the Code.

[10] Had such a request been made at any level, one could surmise that the court, if it found any merit to the request, might then be called upon to attempt to consider what portion of the proceeds would be allocated to the Postpetition Designs for the purpose of then determining how much of the proceeds should be made subject to this "constructive trust" now posited by PGDS. Indeed one can conjure any number of additional factual and legal issues which may have been implicated had such an argument been proffered by PGDS. All of this conjecture is unnecessary, however, since PGDS did not make any such request in any of the courts below.

[11] PGDS attempts to manufacture a "split" among the circuit courts by suggesting that the Second Circuit has taken a different approach from the Third and Tenth Circuits by failing to impose a constructive trust. The obvious flaw in this argument is that, as noted above, PGDS never requested the imposition of a constructive trust. It thus cannot be known how the court of appeals (or the district court or the bankruptcy court) would have treated such a request had it been made. PGDS' speculations do not however, create a "split" among the circuit courts of appeal.

protected interest affected by the bankruptcy proceeding, *In re James Wilson Assoc.*, 965 F.2d 160, 169 (7th Cir. 1992); *In re Caldor, Inc.*, 193 B.R. 182, 186 (Bankr. S.D.N.Y. 1996).

To challenge a sale of property, one must be able to show an interest therein. *In re Phoenix Steel Corp.*, 82 B.R. 334, 335 (Bankr. D. Del. 1987). PGDS claims its interest as a licensee of designs made by Paolo. However, by the terms of the very agreements upon which it relies, PGDS has no such interest. Among terms of the PGDS License and the Agreement -- are: (i) that the master license (*i.e.*, the PGDS License) must comply with and shall not contradict the Agreement in any way, (ii) the Agreement is ineffective until bankruptcy court approval, (iii) only upon such approval will the rights under the Final Judgment to commercially exploit the Paolo Gucci name be conveyed to Paolo, who would then convey them to the master licensee, *i.e.* PGDS and (iv) no licensing business would commence until after court approval.

Given these terms, and the fact that PGDS is a signatory on both the Agreement and the PGDS License, its lack of standing becomes manifest. First, since under the Agreement, only upon court approval could the rights which PGDS now claims be conveyed back to Paolo by the Estate, PGDS has admitted that the Estate owned the rights as of October 3, 1995.[12] Second, those rights would only be conveyed back to Paolo (and then by Paolo to PGDS) upon court approval, which never occurred. Accordingly, PGDS never acquired these rights from Paolo because Paolo never got them back from the

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[12] The essential property which PGDS claims it has licensing rights to is the right under the Final Judgment to affix the Paolo Gucci name to the designs, including the Postpetition Designs. The Postpetition Designs which were sold to GG are only those using the Paolo Gucci name under the Final Judgment. Designs which do not use the Paolo Gucci name were not sold to GG and are not the subject of the Sale Order.

Estate. In fact, Paolo died several days after signing the Agreement.[13]

Third, Paolo could not, under the PGDS License or otherwise, independently convey these rights to PGDS due to his status as a Chapter 11 debtor. As such, bankruptcy court approval would be necessary to convey a long term master license covering essentially all of Paolo's licensing business. *See, e.g.*, Code §363(b). *See also, In re National Reserve Corp.*, 199 B.R. 241 (Bankr. D.Mass. 1996) (debtor had no authority to enter into postpetition premium financing agreement without court approval); *In re Masters. Inc.*, 149 B.R. 289 (E.D.N.Y. 1992) (debtors cannot bind their estates to compromises absent bankruptcy court approval); *In re American Development Corp.*, 95 B.R. 735 (Bankr. C.D. Cal. 1989) (transfer of all assets of corporate debtor not in ordinary course of business and requires court approval.) Moreover, due to the appointment of the Trustee, Paolo was no longer the representative of the Estate (Code §323(a)) and was under an affirmative duty to cooperate with the Trustee (Code §521(3)).

Fourth, PGDS' assertion that it obtained rights directly from Paolo under the PGDS License without considering the pertinent provisions of the Agreement constitutes a direct contradiction of the Agreement to which PGDS is bound.

Even if PGDS had not specifically agreed in writing to be fully bound by the Agreement (which includes an agreement that the PGDS License will fully comply with, and will not contradict in any way, the Agreement), it is well established that where several instruments constitute part of the same transaction, they must be interpreted together.

> In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the

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[13] Paolo, too, by signing the Agreement, admitted that these rights resided with the Estate as of October 3, 1995.

> course of the same transaction will read and interpreted together, it being said that they are, in the eye of the law, one instrument.

BWA Corp. v. Alltrans Exp. U.S.A., Inc., 493 N.Y.S.2d 1 (1st Dep't 1985) *citing Nau v. Vulcan Rail & Construction Co.*, 286 N.Y. 188, 36 N.E.2d 106 (1941); *Carvel Corp. v. Rivers Management Group*, 930 F.2d 228 (2nd Cir. 1991) (Contemporaneously executed promissory notes and distributorship agreement were required to be treated as single contract, and thus, corporation could not recover on promissory notes without complying with notice and cure provisions of distributorship agreement, where promissory notes were executed for sole purpose of making payments under distributorship agreement and notice and cure provisions of agreement dealt specifically with consequences of distributor's failure to make timely payments); *See also, Guardsman Lease Plan, Inc, v. Gibraltar Transmission Corp.*, 494 N.Y.S.2d 59, 129 Misc. 2d 887 (1985).

Moreover, even if the writings are executed at different times, contracts should be interpreted together if "the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken." *Commander Oil v. Advance Food Service Equipment*, 991 F.2d 49, 53, (2d Cir. 1993) *citing* 6 Williston, Contracts, §863 at 275 (3rd Ed. 1970) (Asset purchase agreement and lease, which involved purchaser's rental of seller's premises, were properly construed as single agreement, for purpose of establishing purchaser's indemnification obligations where the transactions, though not contemporaneous, were intertwined.) Thus, due to (i) the terms of the Agreement discussed above, and (ii) the fact that Paolo, PGDS and the Estate signed the Agreement, any attempt by Paolo and PGDS to contradict the Agreement in a separate document and thereby diminish or undermine the rights bargained for by the Trustee, is unenforceable against the Trustee.

Finally, to the extent Paolo could have had any interest in the Postpetition Designs, he was enjoined from transferring any such interest (to PGDS or otherwise) by order of the Supreme Court, Justice Gangel-Jacob, described *infra*.

IV. Under General Mootness Principles, The Mootness Finding Of The Court of Appeals Should Not be Reversed

There are two complimentary policies at work in Bankruptcy Code §363(m) and the Code cases generally. The first emphasizes the importance of encouraging finality in bankruptcy sales by protecting good faith purchasers and thereby increasing the value of the assets that are for sale. *In re CGI Industries, Inc.*, 27 F.3d 296, 299 (7th Cir. 1994) *(citing In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 [9th Cir. 1988] [the "primary goal of the mootness rule is to.protect the interest of a good faith purchaser ... of the property thereby assuring finality of sale."] [quotation and citation omitted]); *Greylock Glen Corp. v. Community Sav. Bank*, 656 F.2d 1, 4 (1st Cir. 1981); *In re Sax*, 796 F.2d 994, 998 (7th Cir. 1986) (finality increases value).

In addition, bankruptcy involves equitable consideration as well as the requirement of Article III of the Constitution that there be a live case or controversy. *In re Chateauguay Corp.*, 10 F.3d 944, 952 (2d Cir. 1993). Article III requires that "[when] an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of California v. U.S.*, 506 US. 9, 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 [1895]). An appeal is also moot when "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *In re Chateauguay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993) (appeal by committee from order authorizing payment of funds from the estate had to be dismissed as moot where committee failed to obtain stay pending appeal and order had been fully implemented). *See also, In re CGI*

Industries, Inc., supra, at p. 299. ("Once the sale has gone forward, and even if it may be possible to undo the transaction, the Court is forced with the unwelcome prospect of unscrambling an egg [citation omitted]).

Here, it is not only impossible to "unscramble the egg," but to do so would create, manifest and unconscionable injustice upon the Estate and its creditors.

In essence, it is impossible to return to the situation that existed on August 2, 1996, the date of the auction. At that time, for example, Crown had posted $900,000 in the U.S. to bolster its bid for the Korean Marks. Since the auction, however, the $900,000 has been returned to Crown in Korea, and the Seoul High Court has issued a decision which greatly diminishes or destroys the value of the Korean Marks. As a result, at any re-auction resulting from the unwinding of the Closing (which is the relief sought by PGDS), no bid, or only nominal bids, will be proffered for the Korean Marks -- as opposed to the $1.7 million bid by Crown backed up by $900,000 of cash which was, in any event, since been returned to Korea.[14]

Thus, at any re-auction resulting from reversal, the Estate would be left with substantially devalued assets. As a result, the Estate can no longer conduct an auction with anything near the success achieved in August 1996, and the no effective remedy can be fashioned. *See Arizonans for Official English* v. *Arizona*, *supra* at 36.

Furthermore, since the decision of the court of appeals, substantial amounts of the Closing Funds have been disbursed.

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[14] Even if GG bothered to bid an any such re-auction, it would certainly bid far less due to the devaluation of the Korean Marks. The purpose of GG's bid was, in essence, to eliminate the expense and risk of continued infringement litigation. That risk and expense, however, is now essentially gone in Korea.

Thus, although PGDS would have the Court believe that unraveling the transactions of November 21 and 22 constitutes a simply, nonprejudicial restoration of the *status quo ante*, nothing could be further from the truth. Rather, implementation of that relief would be enormously inequitable to the Estate since the equities of creditors would be destroyed due to the drastic diminishment of the value of the Assets since the auction.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Petition be denied in all respects.

Dated: New York, New York
March 14, 1997

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------	x	ORIGINAL
PAOLO GUCCI,	:	83 Civ. 4453
Plaintiff,	:	(WCC)
– against –	:	
GUCCI SHOPS, INC.,	:	ORDER
Defendant.	:	U.S. DISTRICT COURT FILED JAN 10 1994 S.D. OF N.Y.
----------	x	

This matter having come before this Court for hearings on October 16, 1992 and September 24, 1993, the Honorable William C. Conner presiding, at the United States Courthouse, Foley Square, New York, New York and argument having been heard and considered,

IT IS ORDERED THAT:

1. This Court's Final Judgment, issued on July 13, 1988, is hereby clarified and, to the extent necessary, modified, as follows:

(a) The words "GUCCI" or "PAOLO GUCCI" may be used within the Shield Design Logo (attached to this Order as Attachment A) only

(A) as part of the complete phrase "PAOLO DESIGNED BY PAOLO GUCCI" contained within that Shield Design Logo, provided that the first word "PAOLO" is significantly larger and more prominent than any other word in the phrase, or

(B) when the Shield Design Logo is used in immediate proximity to the separately set forth phrase "PAOLO DESIGNED BY PAOLO GUCCI" and (i) the first "PAOLO" within that separately set forth phrase is significantly larger and more prominent than the words "DESIGNED BY PAOLO GUCCI" and (ii) the words "DESIGNED BY PAOLO GUCCI" are all in the same typestyle, color and size (as in Attachment C to this Order);

(b) The words "GUCCI" or "PAOLO GUCCI" may not be used within the Shield Design Logo except as provided in subparagraph (a) above;

(c) Whenever the phrase "PAOLO (or other TRADEMARK) DESIGNED BY PAOLO GUCCI" appears on a product or on a label affixed to a product, THE WORD "PAOLO" (or other TRADEMARK) must be significantly larger and more prominent than the words "DESIGNED BY PAOLO GUCCI" and the words "DESIGNED BY PAOLO GUCCI" must all appear in the same typestyle, color and size.

2. This Court's Final Judgment, dated July 13, 1988, is hereby clarified to reflect that paragraph 14 of the final Judgment shall not be construed to prohibit plaintiff, Mr. Paolo Gucci, from:

(a) licensing his trademark rights to a corporation which has the right to find sub-licensees for his trademarks and designs; and

(b) permitting said corporation to grant said sublicensees the right to use the phrases "Designed By Paolo Gucci" and/or "Selected By Paolo Gucci" in accordance with the Final Judgment;

PROVIDED ABSOLUTELY, HOWEVER, THAT

All designs indicated as being "Designed By Paolo Gucci" are, in fact, designed by Mr. Paolo Gucci, and all designs indicated as being "Selected By Paolo Gucci" are, in fact, selected by Mr. Paolo Gucci.

3. A copy of this Order shall be provided by Paolo Gucci to all persons whom he or any other person has authorized, may authorize or intend to authorize to use the name "PAOLO GUCCI," or to exercise any of Paolo Gucci's other rights under the Final Judgment, in the United States of America.

4. Except as modified by this Order, the Final Judgment shall remain in full force and effect.

5. This Court retains jurisdiction over the parties to this action for the purposes of enforcement of the Final Judgment and this Order.

/s/ William C. Conner
Sr. United States District Judge

Dated: New York, New York
January 12, 1994

Appendix B

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate,

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.